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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA)	
)	
v.)	CRIMINAL No. CR 03-3089,
)	CR 03-3090, CR 03-3091
LEE BOYD MALVO)	

**COMMONWEALTH'S OPPOSITION TO DEFENDANT'S MOTION
FOR A BILL OF PARTICULARS AS TO THE CHARGE OF CAPITAL
MURDER UNDER VA. CODE § 18.2-31(13)**

I. Va. Code §19.2-266.2 does not Divest the Court of its Discretion as to

Whether to Grant a Bill of Particulars

While Va. Code § 19.2-266.2 contains a provision for the court to grant a bill of particulars, it does not divest the court of its discretion under Va. Code §19.2-230 and the cases interpreting that section. Va. Code § 19.2-266.2 reads in pertinent part as follows:

“To assist the defense in filing such motions or objections in a timely manner, the trial court *shall*, upon motion of the defendant, direct the Commonwealth to file a bill of particulars **pursuant to §19.2-230**” (emphasis added)

Va. Code §19.2- 230 provides that “a court of record **may** direct the filing of a bill of particulars at any time before trial...” Therefore, the Court always retains its right to exercise its discretion in deciding whether to grant or deny a bill of particulars because bills of particulars are always ordered **pursuant to Va. Code § 19.2-230**.

Defendants are not entitled to a bill of particulars as a matter of right. See

Quesinberry v. Commonwealth, 241 Va. 364, 372 (1991).

The Supreme Court has consistently held that Circuit Courts have the discretion to deny motions for bills of particulars where the request is made for the purpose of aiding in the preparation of suppression motions and challenges to the constitutionality of statutes. See Goins v. Commonwealth, 251 Va. 442, 454-455 (1966) (bill of particulars properly denied where defendant sought bill to aid in preparation for motions to suppress and challenge to application of death penalty statutes); Swisher v. Commonwealth, 256 Va. 471, 480 (1998) (trial court properly denied bill of particulars where defendant claimed bill was necessary to help him challenge the constitutionality of statute and prepare suppression motions).

Malvo urges a strained construction of Va. Code §19.2-266.2 upon the court. He would have the court ignore the portion of the statute which states that any bill of particulars shall be ordered “pursuant to Va. Code §19.2-230.” It is an elementary rule of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute.

Another cardinal rule of statutory construction is that the court must give words in a statute their plain meaning. The phrase “pursuant to” has been defined as “ ‘in the course of carrying out: in conformance to or agreement with: according to’ and, when used in a statute, is a restrictive term.” BLACK’S LAW DICTIONARY 1112 (5TH ed. 1979). Thus, Va. Code § 19.2-266.2 must be read as a whole including the specific reference to Va. Code § 19.2-230. United States v. Menasche, 348 U.S. 528 (1955).

Malvo relies upon a footnote in Sims, 28 Va. App. 611, 619n.3 (1998) for the proposition that Va. Code § 19.2-266.2 divests this court of its discretion in matters

pertaining to bills of particulars under the circumstances in this case. His reliance is misplaced. First the footnote in Sims is merely dicta. As the court noted in Sims, id., Va. Code § 19.2-266.2 never came into play because the defendant merely challenged the sufficiency of the indictment and not the constitutionality of the statute under which he was charged. In any event, the court in Sims merely noted that Va. Code § 19.2-266.2 was not operative in that case. The court in Sims did not hold, nor did it even suggest, that Va. Code § 19.2-266.2 divests the court of its discretion when it comes to the granting of motions for bills of particulars. Indeed, in Curmack v. Commonwealth, 95 Va. UNP 0037942 (1995), a case decided under former Va. Code § 19.2-399 (now Va. § 19.2-266), the court reaffirmed the longstanding rule that the trial court has discretion to deny motions for bills of particulars where the indictment sufficiently informs the defendant of the nature and character of the charges against him.¹

Va. Code § 19.2-266 (formerly § 19.2-399) was enacted in order to facilitate the Commonwealth's right to appeal certain rulings of the Circuit Court pursuant to Va. Code § 19.2-398. Under Va. Code § 19.2-398 the Commonwealth must file its petition for appeal before jeopardy attaches at the trial. In order to prevent criminal defendants from delaying suppression motions, and challenges to the constitutionality of statutes, until trial and thereby foreclosing the Commonwealth's right to appeal, the legislature provided that defense motions must be filed and heard before the trial. In this way the Commonwealth would have sufficient time to file any petition for appeal.

¹ Judge Elder who wrote the opinion in Sims participated in the per curiam opinion in Curmack. Judge Coleman also participated in both Sims and Curmack.

II. Bills of Particulars are Appropriately Granted Only Where the Defendant lacks Notice of the Nature and Character of the Offense for Which he is to be Tried.

The function of the bill of particulars in criminal cases in Virginia has been narrowly defined by the courts. "The purpose of a bill of particulars is to state sufficient facts regarding the crime to inform an accused in advance of the offense for which he is to be tried. He is entitled to no more." Hevener v. Commonwealth, 189 Va. 802, 814 (1949). Where the indictment provides the defendant with notice of the nature and character of the offense for which he is to be tried a bill of particulars is not required. Roach v. Commonwealth, 251 Va. 324,340 (1996); Wilder v. Commonwealth, 217 Va. 145, 147 (1976).

III. The Indictment in This Case Fully Apprises Malvo of the Charges against Him.

In this case the indictment fully informs Malvo of the charges against him. The clarity of the indictment is further enhanced by its reference to Va. Code § 18.2-46.4. While this statute defining terrorism may have been enacted relatively recently, its terms are clearly defined in the plain language of Va. Code §§18.2-46.4 and 18.2-31 (13). Malvo knows the nature and character of the charges against him.

IV. A Bill of Particulars is not Properly Used to Expand the Scope of Discovery.

Recently the Court of Appeals reinforced the time honored rule that a bill of particulars is "available to an accused, at the discretion of the court, to supplement a charging instrument which fails to 'fully and clearly set forth all the material elements of the offense,' but not "to expand the scope of discovery in a criminal case." Raja v. Commonwealth, 40 Va. App. 710 (2003) citing Sims v. Commonwealth, 28 Va. App.

at 619- 620. A bill of particulars is not properly granted where a defendant merely seeks to engage in a “fishing expedition” into the Commonwealth’s files. Casper v. City of Danville, 160 Va. 929, 933 (1933). The court in Casper added that “[a] prosecutor is not required to file a pleading laying bare the entire case he intends to prosecute...” Yet despite the fact that Malvo has received a deluge of pretrial discovery and has participated in a two day preliminary hearing and numerous suppression motions which afforded his defense team the opportunity to cross examine many of the government’s witnesses, he now claims a need for even more information. Malvo under the pretext of a bill of particulars, in reality seeks to discover every fact the Commonwealth may present at trial as well as it theories with respect to all of the evidence. He seeks to pervert the function of a bill of particulars by turning it into a discovery device for obtaining information to which he is not entitled. It is not surprising that Malvo’s pleadings fail to make the slightest showing as to how the denial of his motion could possibly impair his ability to mount a constitutional challenge to Va. Code 18.2-31(13).

The Virginia Supreme Court has consistently rejected attempts to misuse the bill of particulars as a discovery device. Swisher, 256 Va. at 481. Again, in Goins, 251 Va. 454-455 (1996), the court rejected the defendant’s claim that he required a bill of particulars in order aid him in preparing pretrial motions to suppress evidence as well as to assist in challenging the constitutionality of Virginia’s death penalty statutes.

Malvo’s claim that he is in so much in the dark with respect to the charges and evidence against him that he is unable to mount a constitutional challenge to the

statute is feeble at best. His effort to conduct a fishing expedition into undiscoverable matters should be denied.

V. Conclusion

For the foregoing reasons as well as for any others which the Commonwealth may present at the argument on Malvo's Motion for a Bill of Particulars, the said Motion should be denied.

RAYMOND F. MORROGH
Deputy Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Defendant's Motion was mailed, postage prepaid, and faxed to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151 and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221 this 10th day of September, 2003.

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